Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

KHEVAJA NAZIMUDDIN and LINDA NAZIMUDDIN,

Petitioners,

v.

WOODLANE FOREST CIVIC ASSOCIATION, INC., CHARLES FUGEE, LINDA CARPENTER, HOLLIE WILIENT, CHRISTINA NEMCHAK, LINDA BUSCHARDT,

Respondents.

On Petition For Writ Of Certiorari To The Texas Court Of Appeal, Ninth District, Beaumont, Texas

PETITION FOR WRIT OF CERTIORARI

KHEVAJA NAZIMUDDIN, pro se (not an attorney)
LINDA NAZIMUDDIN, pro se (not an attorney)
Petitioners
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10 pp

QUESTIONS PRESENTED

1. Whether the Petitioners' Federal constitutional "Due Process" and "Due Course at Law" rights were violated (a) when the court refused to allow Petitioners to testify on their own behalf, (b) refused to read Petitioners' Petition, (c) refused to review evidence in the record, (d) Bias, and (e) the Court contradicts Public Policy?

2. Whether the Petitioners' Federal "impairment of obligations" constitutional right was violated when the court refused to follow the statutes and its construction of those statutes?

3. Whether the Petitioners were denied meaningful access to the court?

LIST OF ALL PARTIES

The petitioners are Khevaja Nazimuddin and Linda Nazimuddin. They are not members of the bar in any state. They are representing themselves pro se.

The respondents are Woodlane Forest Civic Association, Inc., a Texas non-profit corporation, Charles Fugee, Linda Carpenter, Hollie Wilient, Christina Nemchak, Linda Buschardt, officers of the corporation. The Respondents are represented by the Honorable Dr. Clayton Hearn, J.D. Esquire.

Petitioners certified the following is a complete list of the parties, attorneys, and any other person who has any interest in the outcome of this lawsuit:

Petitioners:

Khevaja Nazimuddin
Linda Nazimuddin
P.O. Box 1473
Tomball, Texas 77377
Ph. 281-356-6132

Respondents:

Woodlane Forest Civic Association Attorney: Dr. Clayton Hearn, J.D. Esq.

Charles Fugee
Linda Carpenter
Hollie Wilient
Christina Nemchak
Linda Buschardt

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CITATIONS OF OPINIONS AND ORDERS

The Supreme Court of Texas has issued an opinion in this case, a copy of, which appear as appendix "C". It denied Petitioners' petition for review and Petitioners' petition for rehearing.

Proceedings in the Court of Appeals. Petitioners appealed the judgment to the Ninth District Court of Appeals. The Court of Appeals rendered its judgment and issued an opinion on January 25, 2001 and denied a motion for rehearing on February 1, 2001. A copy of the Court's opinion is attached as appendix "A". The opinion is unpublished.

The trial court's judgment is attached as appendix "B".

STATEMENT OF JURISDICTION

The Petition for Writ of Certiorari was filed less than 90 days from the decision of the Supreme Court of Texas, said denial of the Petition for Review occurred on April 5, 2001 and its decision for a petition for rehearing was entered on June 7, 2001. The jurisdiction of this Court is invoked under 28 USC § 1257(a).

CONSTITUTIONS INVOLVED

This case involves the last provision Article I, Section 19 of the Constitution of the State of Texas. Said provision is set out verbatim in the preceding paragraph. It may be found on the Internet at the website www.findlaw.com. Said section reads as follows:

> "DEPRIVATION OF LIFE, LIBERTY, ETC.; DUE COURSE OF LAW. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land" (Prepared by the Research Division of the Texas Legislative Council Austin, Texas).

This case also involves Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said section reads as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without **due process of law**; nor deny to any person within its jurisdiction the **equal protection of the laws**." (website www.findlaw.com)

Article I, Section 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or **law impairing the obligation of contracts**, or grant any title of nobility.

STATEMENT OF THE CASE

There is no dispute of the facts between Petitioners and Respondents.

On February 3, 1999 Petitioners and Respondents entered into a settlement agreement in order to settle

three lawsuits between them. The agreement calls for Respondents to pay to Petitioners a sum of money and "cash" as the "medium of payment". The Texas Appellate Court based its decision on "that payment of a settlement with a check is ordinary practice." See app. 8, lines 25-26.

On February 26, 1999, in a phone conversation, Linda Nazimuddin told Kristen L. Gillespie, an agent for Respondents – staff in the law firm representing Respondents, that a check is not acceptable to the Nazimuddin as a medium of payment. Ms Gillespie informed Linda that Respondents will not pay Petitioners in "cash". Ms Gillespie said that if Petitioners do not accept a "check" Respondents will not pay any funds and the agreement is not binding on the Respondents. See app. 21, lines 25-27 and app. 22, lines 1-11.

A hearing was held on October 7, 1999. At this hearing, Dr. Clayton Hearn, attorney for Respondents, admitted that the "medium of payment" to Petitioners is "money". See app. 17, lines 12-16. The Court ordered Petitioners to accept a "check". See app. 17, lines 17-18.

Another hearing was held on December 15, 1999. The Court again ordered Petitioners to accept a "check". See app. 18. The Court also imposed $1000.00 sanction against Petitioners for not accepting a "check". See app. 24, lines 17-18.

On motion from Respondents, a breach of contract trial was held on May 2, 2000. At the onset of the trial the judge sua sponte announced that she is limiting the trial as to whether a "check" is the same as "cash". The Trial Court stated "the only issue we had was whether or not money had been offered and refused." See app. 25. The Texas Trial Court determined as its "finding of fact" that the medium of payment to be paid by Respondents to

Petitioners is "cash". See app. 19, lines 15-20. Dr. Clayton Hearn admitted in court during this trial that he was told several times that the "medium of payment" acceptable to Petitioners is "cash". See app. 20, lines 20-24.

Khevaja Nazimuddin presented Linda Nazimuddin to the court as a witness to testify about the contents of her conversation with Ms Gillespie on February 26. The court refused to allow Linda to testify. See app. 20, lines 27-29 and app. 21, lines 1-3. The court never ruled that Linda's testimony was not relevant or competent. The court refused to allow her to testify because the Court said it limits the issue at trial whether a check is the same as cash. See app. 21, lines 4-6. Since the Court would not allow Linda to testify, Khevaja Nazimuddin informed the Court about the contents of her testimony. See app. 21, lines 24-25 and app. 22, lines 1-11.

In its opinion the Texas Appellate Court stated "Counsel for the appellees was unaware of Nazimuddin's demand for payment in money until the December hearing." See app. 5, lines 8-10. The next hearing after December 1999 was the May 2, 2000 trial. Prior to the December 1999 hearing, only one other hearing was held. This was the October 7, 1999 hearing. At the October 7, 1999 hearing, the trial court asked Respondents' attorney "Were you supposed to give him money." See app. 17, lines 12-13. Respondents' attorney admitted that "money" was the "medium of payment".

In its decision, the Texas Appellate Court also stated "At the May 2000 hearing, Khevaja Nazimuddin admitted he and his wife did not specifically say "cash" when they first communicated their demand regarding the medium of payment, ...". See app. 8, lines 10-14. The Appellate Court was quoting app. 23. This appendix shows during

the May 2, 2000 hearing, Khevaja Nazimuddin was asked by the Respondents if the Association was notified in writing that a check was not acceptable. Nazimuddin answered that Association was not informed in **writing** that a check was not acceptable. See app. 23, lines 7-20. Khevaja Nazimuddin testified that Linda Nazimuddin orally informed Respondents, that a "check" was not acceptable. See app. 21, lines 24-25 and app. Lines 1-11.

The trial court stated "They offered you the **money**. You refused to take it." See app. 26, lines 7-8. This comment was made after the court pronounced its decision. The Court repeated this statement. See app. 25.

Attached as appendix "E" is the "due process" section of Petitioners' petition to the Texas Appellate Court. The Petitioners' petition stated "The refusal of the Court to allow the Nazimuddins to present their evidence and allow their witness to be heard denied them their due process of law rights." See app. 29. In its opinion the Texas Appellate Court stated that Petitioners complained about the refusal of the trial court to consider their motion for summary judgment. See app. 9, lines 7-9.

REASONS FOR GRANTING THE PETITION

Each day millions of common citizens, who are homeowners, in this country entered into contracts written in the English language. The Courts tell these citizens that they are presumed to know the laws as they affect the contract. Common citizens expect that if they go to court because of terms of a contract, the court will allow them to testify on their own behalf. When courts arbitrarily refused to allow a citizen to tell their side of the story, this makes the Federal constitution meaningless.

This court has repeatedly ruled that a common citizen has the right to go to court and be allowed to testify in their defense. When the citizen is prevented from doing so, it means the court is only open to a relatively few.

The foundation of justice in this country is that a judgment must be based on the facts of the case as determined by the court (*Phillips v. Hill*, 3 Tex. 397, *Evans v. Evans*, 314 P.2d 291, 415 So. 2d 821, *Central Coast Meats, Inc v. United States Department of Agriculture*, 541 F.2d 1325). The Respondents admitted in open court that the "medium of payment" to Petitioners is "cash". The Texas trial court determined as a fact the "medium of payment" to Petitioners is "cash". The court ordered Petitioners to accept a "check" and when Petitioners refused the court imposed monetary penalties against Petitioners. When an American court of law pronounced a judgment not based on its own "finding of facts", this makes the notion of justice in America a mockery. This is not only a problem to Petitioners. It is a common problem to numerous citizens in this great country. See ABA Journal (June 2000), 86 A.B.A.J, Yes, its my Suits Castle: Suits by unhappy residents against homeowners' association grow, Laura Trognitz.

The Texas courts are sending an implicit message to immigrants and common citizens in this country that you do not need to learn the laws of this country or English in order to participate in the opportunities of American life. This perpetuates a "knowledge of government" deficient underclass within the United States of America. Trapped in linguistic ghettos, those who cannot speak or read English or be familiar with the laws will never be full participants in the American "melting pot" experience. In effect the Texas Courts are telling common citizens that to

obtain your rights, you must navigate "a baffling skein of provisions" resembling "King Minos's labyrinth in ancient Crete," *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977). Common citizens must do so without the guidance of the common meaning of English language words.

The Texas Legislature determined that "Public Policy" demands that the Courts of Texas must use "American English". The Petitioners are common people with common intelligence. They are not attorneys nor have they been trained in law. This case has national significance because common people of common intelligence entered into contract written in the English language each day. The ordinary citizen expects that the court will not ignore "American English" or its own "finding of facts".

ARGUMENT

ISSUE 1: WHETHER PETITIONERS' "DUE PROCESS" AND "DUE COURSE OF LAW" RIGHTS WERE VIOLATED?

(a) Refusal to Allow Linda Nazimuddin to Testify

In their petition to the appellate court the Petitioners argued that they should have been allowed to present witness and exhibits. See app. 20. In its decision, the appellate court refused to rule on whether the Linda Nazimuddin has a Federal constitutional right to testify in her defense. The trial court refused to accept her as a witness. Linda's testimony was very important to show that Respondents were verbally informed in February 1999 that a check was not acceptable. Her testimony was also important to show that Respondents informed

Nazimuddin in February 1999 that they would not perform under the unambiguous language of the agreement.

Citing from the reporter's record, the Texas Appellate court wrote, "So I don't get to put into evidence the exhibits I had, the correspondence from him, et cetera, so it would be part of the file? The trial court said no, because he had not offered them earlier." This is patently false. Petitioners earlier offered the testimony of Linda Nazimuddin. The trial court refused to allow Linda Nazimuddin to testify. See app. 20.

Development of the Right to Testify

Under the early common law, interested parties, including persons accused of committing a crime, were disqualified from presenting sworn testimony. (97 C.J.S. (1957) Witnesses, § 120, p. 545; *Ferguson v. Georgia* 365 U.S. 570, 573 [81 S. Ct. 756, 758-759] (1961).) This disqualification of parties from presenting sworn testimony was clearly established by the end of the 16th century in civil cases on the basis the party's testimony was untrustworthy. (*Ferguson v. Georgia*, supra, at p. 573 [81 S. Ct. at pp. 758-759].)

By the mid-19th century, parties and interested witnesses in civil cases were allowed to give sworn testimony in England and in most states in this country. (O'Neill, Vindicating the Defendant's Constitutional Right to Testify at a Criminal Trial: The Need for an on-the-Record Waiver (1990) 51 U. Pitt. L.Rev. 809, 813, citing inter alia Popper, History and Development of the Accused's Right to Testify (1962) Wash. U. L.Q. 454, 458.) The elimination of the disqualification was based primarily on an argument that " . . . a witness's motive for lying

should go to the weight, not the admissibility, of testimony." (51 U. Pitt. L.Rev. at p. 813.) As one legal commentator argued in 1835: " '[A]ll evidence should be taken at what it may be worth, that no consideration which has a tendency to produce conviction in a rational mind should be excluded from the consideration of the tribunals.' " (Lord Macaulay's Legis. Minutes, 1835, pp. 127-128, as quoted in *Ferguson v. Georgia,* supra, 365 U.S. 570, 575 [81 S.Ct. 756, 760].) See also, *The Jury's Rise as Lie Detector,* 107 Yale L.J. 575, George Fisher.

English is the language of this country. See *Soberal-Perez v. Schweiker,* 549 F.Supp. 1164. It is reasonable that a competent individual who receives a formal or an official-appearing document would be put on notice that an accurate translation was necessary. This conception is fundamental in the administration of all public affairs. This is not an officially multilingual country, and notification of official matters in the sole official language of both this nation and the State of Texas is patently reasonable.

Common people, with common intelligence, commonly use the word "et cetera" in everyday language. The AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1976)[1] defined the term "et cetera" as: "and other unspecified things of the same class." One can leaf through other dictionaries, and in none of them will one find that the word "et cetera", as used by Petitioners, can under any circumstances does **not** mean "other evidence". In each and every volume dedicated to the definition of words, one will find that "et

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[1] See *Floyd v. State,* 575 S.W.2d 21, 23.

cetera" as used by the Petitioners means "testimonial evidence of Linda Nazimuddin"[2].

The Texas Courts, thus, in refusing to rule on whether the testimony of Linda Nazimuddin is evidence, defies every dictionary instructing the English-speaking people on the use of language. And still more than that, the Texas Courts are amending the dictionary.

In footnote 23 of *Taylor v. Illinois*, 484 U.S. 400 (1988), this Court observed that the Illinois courts have held that, "[t]he exclusion of evidence is a drastic measure; and the rule in **civil cases** limits its application to flagrant violations, where the uncooperative party demonstrates a deliberate contumacious or unwarranted disregard of the court's authority . . . " the reasons for restricting the use of the exclusion sanction to only the most extreme situation are even more compelling in the case because there was no uncooperativeness and the Texas courts accessed penalties against Petitioners.

The Texas Appellate Courts refused to rule whether its refusal to permit Petitioners to present to the court competent relevant testimony of Linda Nazimuddin violated their Federal constitutional rights. See *Thomas v. State*, 58 So. 2d 173 ("Disregard for the Constitution in order to accomplish some reform, or worthwhile purpose, can only lead to the ultimate destruction of constitutional government."). The refusal of the court to permit the testimony of Linda Nazimuddin violates the "due process" and "due course at law " clauses of Texas and

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[2] See *United States v. Powell*, 423 U.S. 87, 90 (1975); *Gooch v. United States*, 297 U.S. 124, 128 (1936)

Federal constitutions[3]. See U.S. CONST. Amend. XIV § 1; TEX. CONST. art. I, § 19[4]; *Morris v. Short*, 902 S.W.2d 566; C. McCormick, The Scope of Privilege in the Law of Evidence, 16 Tex. L. Rev. 447, 469 (1938) (The "manifest destiny of evidence law is a progressive lowering of the barriers to truth.").

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[3] See *Rock v. Arkansas* (483 U.S. 44), *Saunders v. Shaw* (244 U.S. 317).

[4] In *Mooney v. Holohan* (294 U.S. 103), the United States Supreme Court stated "If the presentation of false evidence is a denial of due process in criminal cases, it is likewise a denial of due process in civil cases, and if it is a denial of due process in cases in which severe penalties or large sums are involved, it is likewise a denial of due process in cases in which nominal penalties and nominal sums are involved.

Other courts have ruled that one of the guarantees of due process of law under the State and the U.S. Constitution is for every litigant to have the court hear competent testimony from witnesses and any other competent, relevant evidence. *Jackson v. Procunier*, 789 F.2d 307 (5th Cir.). In *Knoff v. American Crystal Sugar Co.*, 380 N.W.2nd 313, 320 the Nebraska Supreme Court noted that a trial court's refusal to permit one of these non-testifying experts from testifying for the opposing side "in effect suppressed an eyewitness." In *Whittaker v. Thayer*, 110 S.W. 787 the court ruled "It has often been held that the admission of incompetent testimony over objections seasonably interposed, is harmless where testimony to the same effect has been admitted without objection; but we know of no case that extends the rule so to competent evidence."

See *Fuentes v. Shevin*, 407 U.S. 67, 80; *Lachance v. Erickson*, 522 U.S. 262, 118 S. Ct. 753 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard"); *Regennitter v. Commissioner of the Soc. Sec. Admin.*, 166 F.3d 1294, 1298 (9th Cir. 1999) ("We have explained, however, that 'the fact that a lay witness is a family member cannot be a ground for rejecting his or her testimony.' ").

The attorney for Respondents testified that he was told several times, in open court, that "cash" is the "medium of payment" acceptable to Petitioners. See app. 20. Citing the dictionary the Court in *U.S. v. Leebridges,* 50 F.3d 789 (10 Cir. – March 1994) define the word "several" as "an indefinite number more than two and fewer than many."; *Brown v. The State Bar of Texas,* 960 S.W.2d 671(1997) (" 'Several,' is simply defined as a number more than two, but not many, a few."). The Texas Appellate Court stated that the first time Respondents knew that the "medium of payment" demanded by the Petitioners was December 1999. The December 1999 hearing was the last one held before the May 2000 trial. Respondents' attorney admitted that Petitioners were to be paid "money". See app. 17 and app. 20. The evidence contradicts the statement of the Appellate Court.

Petitioners are not attorneys. It is presumed that an attorney knew the meaning of words he chose when speaking. *Beley v. Pennsylvania Mutual Life Ins. Co.,* 95 A.2d 202 ("The insurance company, whose attorneys wrote the contract, must stand by the words employed by their agents"). From the sworn testimony of Respondents' attorney, it is obvious that he knew before the October 7, 1999 hearing that the medium of payment demanded by Petitioners is "cash". See app. 20. The testimony of Linda Nazimuddin was crucial to show that she informed Ms. Gillespie, in February 1999, that the medium of payment demanded by Petitioners was "cash". See *Ex Parte Jackson,* 470 S.W.2d 679 ("Testimony" is evidence given by a competent witness under oath or affirmation as distinguished from evidence derived from writing and other sources.

Although "testimony" and "evidence" are frequently used synonymously the terms are not synonymous. Evidence is the broader term and includes all testimony which is one species of evidence").

Fundamental to the concept of due process is the right to be heard. The right to be heard includes an opportunity to cross-examine witnesses. The Texas Courts allowed Respondents to present witnesses but refused to allow Petitioners present their witness. This is disparate treatment and violates Petitioners "due process" rights. See *Hicks v. Oklahoma,* 447 U.S. 343, 346 (disparate treatment under state law may rise to federal due process violation). Due process of law and the equal protection of the laws are had when the laws affect alike all persons similarly situated. *Walston v. Nevin,* 128 U.S. 578; *Giozza v. Tiernan,* 148 U.S. 657; *Duncan v. Missouri,* 152 U.S. 377.

(b) Refusal to Read Petitioners' Petition

The law in Texas and in every state is that a court must read a petition from its four corners and in its entirety. The court must give the language its plain and ordinary meaning and interpret it as it fairly appears to have been intended by the pleader. Further, all pleadings should be construed so as to do substantial justice[5].

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[5] See *St. Paul Fire and Marine Ins. Co. v. Microsoft Corp,* 102 F. Supp. 2d 1107 (1999) ("Court must read the petitions in their entirety and give language whatever meaning is most consistent with the documents as a whole."); *Fenstermaker v. City of San Antonio,* 283 S.W. 883; Tx. RAP 59.3 ("Counsel should assume that all Justices have read the briefs before oral argument").

The petitioners' petition to the Texas Appellate Court is written in the English language. The Petition stated "The Trial Court was aware of the above pleadings filed by the Nazimuddins with the Court on March 8, March 31, and April 11, 2000 . . . . The refusal of the Court to allow the Nazimuddins to present their evidence and allowed their witness to be heard denied them their due process of law rights". See app. 29. The Texas Appellate Court, in its decision, stated "The appellants' brief complains the trial court refused to consider their motion for summary judgment." See app. 9 ("Issue seven asks). Nowhere in their petition did Petitioners complain about the refusal of the trial court to consider their motion for summary judgment. See appendix "E". In their petition to the Texas Appellate Court Petitioners stated "The refusal of the Court to allow the Nazimuddins to present their evidence and allowed their witness to be heard denied them their due process of law rights". See app. 29. In its decision, the Texas Appellate Court never mentioned the word "witness".

In its decision the Texas Appellate Court stated "At the May 2000 hearing, Khevaja Nazimuddin admitted he and his wife did not specifically say 'cash' when they first communicated their refusal to sign the release." See app. 8, lines 12-13. This statement by the Court is patently false[6]. Khevaja Nazimuddin testified "I didn't say cash." See app. 23. The letter "I" refers to the person speaking. In this case it was Khevaja Nazimuddin. Khevaja

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[6] See *Freiberg, Kline Co. v. Magale*, 70 Tex. 116, 7 S.W. 684 ("The rule is that when an exhibit is referred to in pleading, and its inspection shows facts contradictory to the pleading, in considering the pleading on demurrer, the exhibit, and not the allegation in the pleading, must control.")

Nazimuddin admitted that he nor his wife "specifically say cash in writing". See app. 23. The Texas Court was not reading this appendix to do justice as required by Texas law.

It is clear the Appellate Court never read the Petitioners' petition[7]. The refusal of the Texas Appellate Court to read and correctly quote from Petitioners' petition and the record is a violation of their federal "due Process" rights[8].

(c) Refusal to Review Evidence

The Appellate Court never reviewed the evidence in the record. In its decision the court stated "In the December 1999 hearing, Nazimuddin clearly communicated his desire to be paid in currency rather than by check." See app. 8. The Petitioners directed the Appellate Court to the applicable part of the record whereby the Respondents admitted in open court on October 7, 1999 that they agreed to pay money to the Petitioners. Respondents' attorney admitted that he was told at several hearings that a "check" was not acceptable. See app. 20. The Texas Trial Court found as its "finding of fact" that Petitioners were to be paid in cash. See app. 19. "Money" and "cash"

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[7] See *Musson v. Lake*, 45 U.S. 262 ("The acts of public officers are favored to the extent that they are presumed to know their duty, and to do their duty, unless the contrary appears. . . . A contrary doctrine casts the presumption against the officer, and arraigns him, by implication, for a breach of duty; and that, too, in the absence of an interest or a motive").

[8] See *Thomas v. Collins*, 860 S.W.2d 500 ("Pro se pleadings are to be reviewed and evaluated by standards less stringent than those applied to formal pleadings drafted by lawyers.").

are used by lay-people as synonymous words[9] See *Bloch v. Woellert*, 90 S.W.2d 653, the court stated "And, generally speaking, the two words are synonymous, interchangeable, or, as stated by the Supreme Court of South Carolina: "There can be no doubt that there is a shade of difference between the words 'next' and 'nearest.' It is likewise equally true that this shade of difference is often disregarded. Therefore, if by using the terms as synonymous the proper intention can be arrived at, we can legitimately do so. ROGET'S II The New Thesaurus (3rd ed.) provides "money noun Something, such as coins or printed bills, used as medium of exchange; cash currency." The refusal of the Texas Appellate Court to review and accept the evidence in the record is a violation of Petitioners' "Due process" and "Due Course at law" constitutional rights.

The early settlers in this country brought with them their language and their conceptions of the meaning of the words that comprise such language. The common meaning of words were used to memorialize the law. The Texas Legislature knew[10] common law meaning of "cash" and "check" when it enacted Tex. Bus. & Com. Code

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[9] See *Lund v. Dalton*, 384 S.W.2d 825 ("In the usual and ordinary usage of language the words "dollars", " money" and "cash" are synonymous terms."); *Commercial Credit Corporation v. Third & Lafayette Sts. Garage, Inc.*, 226 A.D. 235 ("To my mind, the word "cash" is synonymous with the word "money."). In *United States v. Van Auken*, 96 U.S. 366, the court said (page 368) "A dollar is the unit of our currency. It always means money, or what is regarded as money."

[10] *Martin v. Railroad Commission of Texas*, 93 S.W.2d 1155 ("it will be presumed that the legislature is cognizant of the manner and circumstances under which such business or occupation is carried on").

§ 1.201 (24) (definition of "cash") and Tex. Bus. & Com. Code § 3.104 (definition of "check"). See *Hanson v. Taylor*, 23 Wis. 547 ("All statutes are supposed to be enacted with reference to the rules of the common law upon the same subject; and words and phrases having a settled common law meaning, are, when found in a statute, presumed to have been employed in the same sense, unless the contrary expressly appears"). This is evident from the fact that the Legislature stated that these laws must be read in modern American English. See Tex. Civ. Prac. & Rem. Code § 1.001(b)(4).

It is clear that the law in Texas is that "money" and "cash" are synonymous terms. A "check"[11] is not synonymous with either "cash" or "money". It is not splitting hairs to distinguish between "cash" and "check", as used in the Texas statutes. This is evident from the fact that Legislature provided for separate definitions.

This case can be analogized to Education Law cases whereby the grant of tenure to a teacher was binding and cannot be rescinded. It is a constitutionally protected right under due process of law (*Keyishian v. Board of Regents*, 385 U.S. 589). The same principle is applicable case in the instant case. In this case the Texas courts are doing the rescinding. The Respondents admitted that "money" is the medium of payment. The Texas trial court found in its "finding of fact" "cash" was the medium of payment that Petitioners were to be paid. Respondents' attorney admitted he was told several times, in court, the medium of payment is "cash". The Texas court rescinded

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[11] *Firtell v. Crest Builders, Inc.*, 159 A.D.2d 352 ("It is not for the court to enlarge the meaning of the words in the contract so as to correct seller's admitted oversight".)

the settlement agreement and ordered Petitioners to accept a "check". See app. 24. When petitioners refused the Texas court imposed monetary punishment. See app. 24. This violates Petitioners' Federal constitutional "due process" and "due course at law" constitutional rights.

(d) Bias

This Court has repeatedly held that constitutional due process entitles parties to unbiased decision-makers. See *Aetna Life Ins. v. Lavoie,* 475 U.S. 813, 824 (1986); *Morrissey v. Brewer,* 408 U.S. 471, 485-86 (1972); *Gibson v. Berryhill,* 411 U.S. 564, 579 (1973). Since generally attorneys are the ones who appear before a judge in court, it is obvious that the Texas courts were bias against Petitioners because they are not attorneys. The trial court imposed sanction against Petitioners because they refused to surrender their rights. The Court determined as its "finding of facts" that cash was the medium of payment agreed upon between Petitioners and Respondents. The Respondents admitted in Court that they were told several times that "cash" is the "medium of payment" demanded by Petitioners. The Court still ordered Petitioners to accept a "check" and sanctioned Petitioners for not accepting it. In addition, the trial court refused to allow Petitioners to testify on their own behalf. This amounts to bias by the court against Petitioners and a violation of their due process rights.

(e) Public Policy

It is well settled, in this country, when the lawmakers speak upon a subject over which they have constitutional jurisdiction, their words define the "public policy" of the

subject. See *United States v. Trans-Missouri Freight Assn.*, 166 U.S., 290, 340. The Texas legislature gives a clear and unambiguous definition of "cash". In its finding of facts the Texas trial Court stated that the settlement agreement calls for Respondents to pay Petitioners in "cash". The Respondents admitted in open Court on October 7, 1999 that they agreed to pay Petitioners in "cash". On May 2, 2000 the Petitioners' attorney, Dr. Clayton Hearn, testified in Court that in several hearings, Petitioners told him that they wanted "cash" as the medium of payment. The Texas Appellate Court contradicted the testimony and admission of Respondents. The Texas Appellate Court stated, in its opinion that Respondents first knew that Petitioners wanted "cash" as the medium of payment was on December 15, 1999. This is not correct. The Respondents' admitted on October 7, 1999 that they agreed to pay Petitioners "money". See app. 17. "Money" and "cash" are synonymous terms.

An important requirement of policy is "that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice" unless, perchance, contravention of public right or welfare very clearly appears. *Missouri, Baltimore & O.S.W. Ry. Co. v. Voigt*, 176 U.S. 498. The very meaning of 'public policy,' "when used in consensual obligation and performance is the interest of others than the parties." See *Beasley v. Texas & P. Ry. Co.*, 191 U.S., 492, 498. The very fact that the Texas Courts went against the definitions mandated by the legislature, refused to allow Petitioners to testify on their own behalf, and the clear language of its own finding of fact affect the interest of others that entered into

contractual relationships. The actions of the Texas Courts have Federal Constitutional implications for all citizens of this country as it grossly violate the Federal Constitution. This violation of "public Policy" by the Texas Courts violate Petitioners "Due Process" and "Due Course of Law" constitutional rights.

The civil adjudicative process is primarily designed for the settlement of disputes between parties. Punishing a party because that party refused to surrender his/her rights is a subversion of the judiciary; further, the person against whom the judicial process is so misused may be deterred from asserting legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, tends to diminish public confidence in our legal system. At a minimum, "due process" and "equal protection" mean the right to have the laws passed for one's protection enforced correctly. This Court has a long history of shielding a citizen against encroachment by the sovereign as its experience has shown that where a right is curtailed on one citizen, it has a cumulative effect on all citizens.

ISSUE 2: WHETHER THE PETITIONERS' FEDERAL IMPAIRMENT OF OBLIGATIONS CONSTITUTIONAL RIGHT WAS VIOLATED?

The Texas Supreme Court has repeatedly ruled that "What the law inserts is as much a part of the contract as what is expressly written in it"[12] The law inserted TEX.

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[12] *Great American Insurance Company v. North Austin Municipal Utility District No. 1*, 950 S.W.2d 371; *Ryan & Co. v. M., K. & T. R'y Co.*, 65 Tex. 13; *Barton v. Wichita River Oil Co.*, 187 S.W. 1043; *Grounds v. Tolar Independent School District*, 694 S.W.2d 241.

FIN. CODE ANN. § 302.002[13] into the settlement agreement between Petitioners and Respondents. See *Cox v. Davison*, 397 S.W.2d 200.

In Texas interest[14] is a statutory creature[15]. The Texas Supreme Court gave its statutory construction of Texas Fin. Code 302.002[16] The Texas Supreme Court ruled that Texas Fin. Code 302.002 is an implied term in contract. The Texas Trial Court determined in its "findings of fact" that "cash" is the "medium of payment" to be paid to Petitioners but ordered Petitioners accept a "check". The effect of the Texas Trial Court's order was for Petitioners to involuntary surrender their "implied in law rights". The actions of the Texas Courts are to impair the obligation of contracts under the Federal constitution[17]. The

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[13] *Coltharp v. Carnesale*, 733 So. 2d 780 ("The rules of the court are supposed to be for the purpose of promoting justice and fair play").

[14] *State v. Tingle*, 60 So. 728 ("If the court knows what the language of the statute means, it necessarily speaks the same language to all, whether they be lawyers, judges, or ordinary citizens".)

[15] Texas Fin. Code 302.002 (inserted by law – see *Cox v. Davison*, 397 S.W.2d 200).

[16] *Rio Grande Land & Cattle Co. v. Light*, 758 S.W.2d 747, 748.

[17] *Green v. Neal*, 31 U.S. 291; *Shelby v. Guy*, 24 U.S. 361. In the case of *Ohio Ins. Co. v. Debolt*, 57 U.S. 416, Chief Justice Taney said: "That the sound and true rule was that, if the contract when made was valid by the laws of the state as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation can not be impaired by any subsequent act of the Legislature or decisions of its court altering the construction of the law." In *Douglass v. Pike County*, 101 U.S. 677, it was held that: "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing

Texas Courts are amending Texas Fin. Code 302.002. They are now saying it is not part of the contract. In effect the court is making legislation and in the process violated the Petitioners' Federal constitutional "impaired contractual", and "equal protection clauses rights". See *Central Land Co. v. Laidley,* 159 U.S. 103, 111-112 ("But when the state court, either expressly or by necessary implication, gives effect to a subsequent law of the State whereby the obligation of the contract is alleged to be impaired, a Federal question is presented"); *Bacon v. Texas,* 163 U.S. 207, 220-221; *Turner v. Wilkes Co.,* 173 U.S. 461; *General Motors Corporation v. Romein,* 503 U.S. 181.

The Federal Constitution is also a law – the supreme law, prohibiting of the enactment of laws impairing the obligation of contracts also becomes a part of each contract[18]. In demanding that the Petitioners surrendered their contractual rights, the Texas Courts are clothing themselves with Legislative power. In America, it is fundamental, that the judicial construction of a statute becomes a part of it[19], and, as to rights, which accrue afterwards, it should be adhered to for the protection of those rights. The Texas Courts demanded that the Petitioners surrendered their right to receive the "implied at law" interest by accepting a "check" as the "medium of

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contract rights that would be given to a legislative amendment." See also, *Louisiana v. Pillsbury,* 105 U.S. 294.

[18] *Langever v. Miller,* 124 Tex. 80; *Pension Benefit Guaranty Corporation v. R. A. Gray & Co.,* 467 U.S. 717, 730(1984).

[19] *Grayned v. City of Rockford,* 408 U.S. 104, 110 ("a court can impute to a person of common intelligence knowledge of any limiting construction of the statute that a state court or enforcement agency has proffered").

payment"[20]. This is a rewriting of the laws as it affects the "settlement agreement" and a violation of Petitioners' Federal constitutional rights.

The Petitioners' petitions to the Texas Courts were written in American English Language. The Texas Legislature enacted Tex. Civ. Prac. & Rem. Code § 1.001(b)(4) and Tex. Finance Code § 1.001(b). These laws are implied terms of the "settlement agreement" and both contain identical language. They provide as follows: "restating the law in modern American English to the greatest extent possible". The use of the word "American" by the legislature suggests a usage by the "ordinary common citizen" rather than the professional language used by attorneys and judges.

The Texas Supreme Court gave its judicial construction of the above statutes in *Reilly v. Rangers Management, Inc.*, 727 S.W.2d 527 ("A court should construe contracts from a utilitarian standpoint bearing in mind the particular business activity sought to be served and need not embrace strained rules of interpretation which would avoid ambiguity at all costs).(internal citation omitted) Courts will avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive. (internal citation omitted) when construing a contract, language should be given its plain grammatical meaning."); *Fleming Foods of Texas, Inc. v. Rylander*, 6 S.W.3d 278 (Tex. Supt. Ct. 1998), ("It is imperative that the citizens of this State be able to rely on the plain meaning of our laws

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[20] *Sturgis v. Crowinshield*, 17 U.S. 122 ("The contract binds him to pay that sum on that day, and this is its obligation. Any law which releases a part of this obligation must, in the literal sense of the word, impair it.")

to determine their rights and responsibilities"). In *American Indemnity Co. v. City of Austin,* 246 S.W. 1019, Chief Justice Cureton, writing for the Court, explained that the citizens of Texas must be able to look with confidence to existing law as written. "The law to be just and effective must be accessible and certain", *American Indemnity,* 246 S.W. at 1025. A law must be understandable, not just by a legal scholar, such as an appellate court justice, but by an ordinary person. The United States Supreme Court used English Language Dictionaries and English grammar books printed in America to determine "American English". See *United States v. Bass,* 404 U.S. 336.

The Texas Appellate Court ruled that the "settlement agreement" call for "contemporaneous" payment of cash to Petitioners by Respondents and a signing of a "release of liability". See app. 7. Every American English Language Dictionary provides a definition for "contemporaneous" which connotes a sense of urgent action within the shortest interval of time possible. The Texas Courts determined the "medium of payment" was "cash". The Texas Courts ordered Petitioners to accept a "check" and imposed monetary penalties when Petitioners refused to accept a "check". In *White v. Texas,* 632 S.W.2d 752, the Texas Court "held that 'money', in common parlance means money of the United States. (internal citation omitted) the court held that an indictment which alleges a "theft of money" may be proved by the theft of a check, coupled with evidence that it was endorsed by the accused, cashed, and charged against the maker's account." Accepting a check is not "contemporaneous". This is a judicial amendment of Tex. Civ. Prac. & Rem. Code § 1.001(b)(4) and Tex. Finance Code § 1.001(b).

As Senator Hayakawa explains the purposes and effects of Official English, (127 Cong. Rec. S3998-99 (daily ed. April 27, 1981) "Language is a powerful tool. A common language can unify; separate languages can fracture and fragment a society. The American "melting pot" has succeeded in creating a vibrant new culture among peoples of many different cultural backgrounds largely because of the widespread use of a common language, English."

All those affected by this issue – common citizens of this country who entered into contracts daily – have a pressing need for a legal rule that can be readily understood and followed. The Texas court's nebulous "much more" ruling, devoid of objective criteria, leaves them completely in the dark on the critically important and recurring issue of binding written contracts.

In addition, the Texas Courts have inserted the term "common practice" into the agreement. See app. 8. The Respondents have not presented to the Court any evidence that "common practice" is an implied term in the contract. The Texas Courts are aware of the United States Supreme Court ruling in *Musson v. Lake*, 45 U.S. 262 ("Commercial usages, however ancient, however prevalent, and however reasonable, cannot confront her statutes and annul them, nor reverse her courts' judgments which settle their meaning"). The Texas Courts ignored the ruling of the highest court of America and in the process violated Petitioners State and Federal constitutional rights by inserting terms into to contract.

The law in Texas is that "custom or usage contrary to law is void"[21]. The Texas Courts knew that Texas law inserted TEX. FIN. CODE ANN. § 302.002. The Texas Courts inserted "common practice" to rule against Petitioners. This action by the Texas Courts constitute legislative action and it violates Petitioners' "impairment of contract" constitutional rights.

Texas is a fact-pleading jurisdiction[22]. In Texas the law is that "common practice" must be proved as any other fact[23]. The respondents have never introduced into evidence common practice. The Texas Courts violated Petitioners' constitutional rights when it made rulings on evidence not in the record. See *Walton v. Arizona*, 497 U.S. 639 ("It is well settled that trial courts are presumed to know the law and to apply it in making their decisions.")

Judges as well as legislators make law, and judge-made laws, like statutes, engender constitutionally protected reliance interests. That judges make law has been expressly acknowledged by this Court in a series of decisions which recognize a doctrine of nonretroactivity in cases where unanticipated judicial rulings would upset well-founded reliance interests. See, e.g., *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *Hill v. Stone*, 421 U.S. 289; *Lemon v. Kurtzman*, 411 U.S. 192 (1973); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Cipriano v. City of*

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[21] *Dwyer v. Railway*, 69 Tex. 707 (7 S.W. 504); *Railway v. Fagan*, 72 Tex. 127 (9 S.W. 749)

[22] *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 658 (1996); *Hutchins v. Flintge*, 2 Tex. 473 (note 2 & 3).

[23] *Dwyer v. Railway*, 69 Tex. 707 (7 S.W. 504); See also *Tong v. Borstad*, 231 N.W.2d 795.

Houma, 395 U.S. 701 (1969). In these cases, the Court recognized the "fact of legal life" that judges, as well as state legislators, make law and that "even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." *Lemon v. Kurtzman*, 411 U.S. at 199 (1973). Thus, when the Texas courts determined whether to apply a constitutional decision retroactively, it now engages in a "process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old." *Lemon*, 411 U.S. at 198. Implicit in this process is recognition by this Court that these reliance interests can themselves reach constitutional proportions, and cannot be swept away by judicial legislation.

The impact of abrogating these reliance interests is severe, and completely at odds with the central concern of the Contract Clause: "to encourage trade and credit by promoting confidence in the stability of contractual obligations." *United States Trust Co. of New York v. New Jersey*, 431 U.S. at 15. The decision by the Texas Courts undercuts any expectation of stability by common citizens entering in contracts in Texas. It eliminates from the citizen's considerations the existing law of the state in which it contracts, and exposes the citizen to unforeseen and unpredictable creations of new obligations by state courts – not in small matters of detail, but, in this case, increasing liability exponentially.

ISSUE 3: WHETHER PETITIONERS' CONSTITUTIONAL RIGHTS OF ACCESS TO THE COURT WERE DENIED?

On May 2, 2000 the trial court asked Nazimuddin to make an opening statement. In this statement Nazimuddin clearly told the Court their defense is that Respondents repudiated the agreement. The evidence in the Petitioners' position to prove repudiation is the testimony of Linda Nazimuddin. The refusal of the Texas court to allow Linda Nazimuddin to testify is a denial of Petitioners constitutional right of access to the court under both the state and federal constitutions. The constitutional right of access to the court must be meaningful. The Texas courts did not rule that Linda Nazimuddin's testimony is not relevant. It refused to allow her to testify. Meaningful access to the court is the ability of the individual to be allowed to present relevant competent evidence to the court. The refusal of the Texas Courts to allow the Petitioners to present relevant competent evidence to defend in the breached of contract trial is not meaningful access to the court.

The action of the Texas Courts means that it will allow a citizen to go through the door of the court, but once inside, the court will not allow the citizen to present relevant competent evidence to the court; it will not accept fact it determined (medium of payment is "cash"). This is not meaningful access to the courts, and it is a violation of and the First & Fourteenth amendment of the U.S constitution.

The instant case is analogous to the ruling by the Fifth Circuit Court of Appeals in *Ryland v. Shapiro,* 708 F.2d at 967. The Fifth Circuit Court of Appeals ruled

"Suppression of relevant evidence from the appropriate investigative authorities constitute denial of meaningful access to the courts".

The Texas Court as a matter of fact determines that Petitioners were to be paid by Respondents in "cash". The Texas Courts ignored this fact and ordered Petitioners to accept a check. In *Ex Parte Hejda*, 118 Tex. 218, wherein the Texas Supreme Court held that relator there was denied constitutional due process, and stated, in part, as follows: "Due process of law ordinarily includes: (a) Hearing before condemnation; (b) accordance of reasonable opportunity to prepare for the hearing. Mandate for reasonableness of opportunity may not be attenuated to mere formal observance by judicial action (so-called)."

The same is true in the instant case. The refusal of the Texas court to hear the competent relevant testimony of Linda Nazimuddin, ignoring its own determination of the facts, and refusal to read Petitioners petition are a mere formal observance of judicial action. It is not meaningful access to the court as mandated by the Federal Constitution.

On app. 26 the Trial Court stated "They offered you the money and you refused to take it." On app. 25 the Trial Court stated "the only issue we had was whether or not money had been offered and refused." Petitioners are ordinary people. If money was offered to us why is the Trial Court ordering us to accept a check? Why is the Trial Court punishing us for not accepting a check? This is not meaning access to the court.

SUMMARY OF ARGUMENT

The close relationship between the right of a common citizen to testify on his/her own behalf in a civil case and the Fourteenth Amendment was given specific recognition by this Court in numerous decisions. This court made it clear that the right to testify represent (a) a public policy of the highest national priority; (b) assure citizens of the right to access to the courts in this country. The refusal of the Texas courts to allow Petitioners to testify on their own behalf, while accepting testimony from Respondents, has a chilling effect on all citizens not only in Texas, but also in every state. It would shut the door to the court for common citizens collectively and have the effect of justice for only a privileged few. It would give support to the type of vigilantism and " lynch-mob justice" that any democracy must abhor.

In addition, the ignoring by the Texas Courts of its own finding of facts and commonly understood meaning of English language words make the notion of justice in Texas a mockery. This court should reverse the judgment of the Texas Courts.

PRAYER

For the reasons stated, petitioners ask the Court to grant this petition for certiorari, requests briefs from the parties, set this case for oral argument, and after argument, sustain petitioners' position, reverse the judgment of the Texas courts.

Respectfully submitted to the
Honorable Court

LINDA NAZIMUDDIN, pro se
(not an attorney)
KHEVAJA NAZIMUDDIN, pro se
(not an attorney)

APPENDIX A

COURT OF APPEALS OF TEXAS,
NINTH DISTRICT, BEAUMONT

KHEVAJA NAZIMUDDIN AND LINDA NAZIMUDDIN, Appellants v. WOODLANE FOREST CIVIC ASSOCIATION, INC., CHARLES FUGEE, HOLLY WILLENT, LINDA CARPENTER, CRISTINA NEMCHAK, AND LINDA BUSCHARDT, Appellees

NO. 09-00-210 CV, NO. 09-00-211 CV, NO. 09-00-212 CV

January 23, 2001, Submitted
January 25, 2001, Opinion Delivered

NOTICE:

PURSUANT TO THE TEXAS RULES OF APPELLATE PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY BY COUNSEL OR BY A COURT.

PRIOR HISTORY: On Appeal from the 221st District Court. Montgomery County, Texas. Trial Cause Nos. 98-08-02762-CV, 98-08-02973-CV, and 98-11-03937-CV.

DISPOSITION: AFFIRMED.

JUDGES: Before Walker, C.J., Burgess and Gaultney, JJ.

OPINION:

Khevaja Nazimuddin sued Woodlane Forest Civic Association, Inc. ("Woodlane"), Charles Fugee, Holly Willent, Linda Carpenter, Cristina Nemchak, and Linda Buschardt (referred to collectively as "The Board"), in cause No. 98-08-02762-CV (Appeal No. 09-00-210-CV), for overcharges on his maintenance assessment account (the "assessment suit"). In cause No. 98-11-03937-CV (Appeal No.

09-00-211-CV), filed against Woodlane, Khevaja alleged he was denied the right to participate in the association's electoral process (the "association suit"). Woodlane filed a third suit, cause No. 98-08-02973-CV (Appeal No. 09-99-212-CV), to enforce deed restrictions against Khevaja and his wife, Linda M. Nazimuddin (the "deed restriction suit"). All three suits were mediated on February 3, 1999. The parties reached a settlement agreement which was reduced to writing and signed by all of the parties. Woodlane then amended its petition in the deed restriction suit and filed counterclaims in the assessment and association suits, seeking to enforce the settlement agreement. The trial court conducted a consolidated bench trial on the settlement enforcement claims. The trial court's judgment ordered specific enforcement of the settlement agreement, ordered the Nazimuddins to pay $13,000 in attorney fees, plus additional amounts in the event of an appeal, and dismissed all other pending claims in the suits. The Nazimuddins raise twelve issues in their appeal.

Issue one asks, "Whether evidence was presented to the court during the 'breach of the settlement' phase of the trial and whether there was a stipulation of facts by the Parties?" The source of the first issue is the following recitation in the judgment:

The parties stipulated that the only issues before the Court with regard to the Settlement Agreement made the basis of this action were (i) whether settlement funds were tendered by Woodlane, et al. and (ii) whether tendering a check to the Nazimuddins was consistent with the terms of the Settlement Agreement.

The parties did not stipulate to all of the facts. They did, however, agree that the issues in the case were limited to whether presentment of a check constituted performance by Woodlane such that the Nazimuddins would be required to execute the release. We find the following colloquy in the reporter's record from December 15, 1999:

THE COURT: [Y]ou want me to withdraw my order to sign the release in exchange for the check because it was not cash, it was a check.

MR. NAZIMUDDIN: Correct. That's what we agreed on. We meet face-to-face. We had an agreement. They could have come up with something else in that room when we met.

THE COURT: Okay. So that's the only – from what I hear is the only issue.

MR. NAZIMUDDIN: Correct.

THE COURT: Is there any other – is there any other relief that you are asking for?

MR. NAZIMUDDIN: At this time, no.

At the May 2, 2000, hearing, the following occurred:

THE COURT: Okay. Mr. Nazimuddin, is it your contention that payment was offered, but it was a check and not – and not dollar bills?

MR. NAZIMUDDIN: Not what we agreed upon.

THE COURT: All right. And they offered?

MR. NAZIMUDDIN: A check.

THE COURT: And that's all this is about?

MR. NAZIMUDDIN: Yes, ma'am.

Our review of the record reveals that the trial court heard evidence in the bench trial. Normally, an attorney's statements must be under oath to be considered evidence. Banda v. Garcia, 955 S.W.2d 270, 272 (Tex. 1997). A party waives the oath requirement by failing to object when the opponent knows or should know that an objection is necessary. Id. In the first hearing, Woodlane's attorney and Khevaja Nazimuddin both made extensive factual representations without objection. At the second hearing, both Khevaja Nazimuddin and Woodlane's attorney were sworn as witnesses, and again made extensive representations of fact to the trial judge. The settlement agreement and the check were in the court's file throughout these proceedings. There being no objection to the procedure employed by the court, issue one is without merit.

Issue two inquires: "Whether the appellees repudiated the settlement agreement?"

In their briefs, the Nazimuddins argue that for the assessment and association suits, Woodlane failed to prove it had "funds ready to be paid." In the deed restriction suit, the Nazimuddins argue that Woodlane's pleadings state that the "Defendants had the settlement funds ready to be paid," and, since Woodlane was the plaintiff in that suit, somehow failed to prove it performed the contract. The pleadings that appear in the record are sufficient to place the Nazimuddins on notice that Woodlane and the Board were alleging that they had presented payment and that they were seeking to have the settlement agreement enforced. See TEX. R. CIV. P. 45(b).

At a hearing conducted October 7, 1999, Nazimuddin argued that the appellees had repudiated the settlement agreement by not paying the costs before asking the Nazimuddins to sign the release. In hearings before the trial court conducted December 15, 1999, and May 2, 2000, Woodlane produced a check, written on an insurance company account, payable to Nazimuddin, in the amount of Nazimuddin's court costs. Counsel for the appellees was unaware of Nazimuddin's demand for payment in money until the December hearing. The Nazimuddins took the position that, by not producing paper and coin currency before the release was presented for execution in April 1999, the appellees had repudiated the settlement agreement and any performance by the Nazimuddins was excused.

"Repudiation or anticipatory breach is a positive and unconditional refusal to perform the contract in the future, expressed either before performance is due or after partial performance." Van Polen v. Wisch, 23 S.W.3d 510 (Tex. App. – Houston [1st Dist.] 2000, pet. filed). "To constitute a repudiation or anticipatory breach, the party to the contract must have absolutely repudiated the contract without just excuse." Id. Repudiation consists of conduct that shows a fixed intention to abandon, renounce, and refuse to perform the contract, not a refusal to perform based upon a genuine mistake or misunderstanding as to matters of fact or law. Jenkins v. Jenkins, 991 S.W.2d 440, 447 (Tex. App. – Fort Worth 1999, pet. denied). From the reporter's records of the hearings, it is patently obvious that the appellees never evinced an intention to abandon the settlement, but repeatedly

attempted to implement the agreement. Issue two is overruled.

Issue three asks, "Whether the trial court failed to harmonize the total 'settlement agreement'?" The subject of this issue is the following clause in the settlement agreement: "All cash consideration referenced in this settlement agreement shall only be paid upon the payment & receipt of said consideration being kept strictly confidential." The Nazimuddins argue that this clause means they must be paid in money before they sign the release. This portion of the settlement agreement merely provided that the terms of the settlement would be confidential. Issue three is overruled.

Issue four inquires, "Whether the appellee tender cash?" This issue intertwines issue six, which asks, "Whether a 'check' is equivalent to 'cash,'?" and issue five, "Whether the appellee failed to meet its 'condition precedent'?" The Nazimuddins argue that the contract called for payment in cash, that the appellees tendered a check rather than cash, and that payment in cash is a condition precedent to the enforcement of the contract.

First, we consider whether payment in "coin of the realm" was a condition precedent. The settlement agreement stated, "All payable costs, as calculated by the District Clerk of Montgomery County shall be paid to Nazimuddin from Woodlane within thirty days of being presented a copy of the cost bill from the district clerk." A later paragraph in the settlement agreement states, "Upon presentment of the cash consideration Nazimuddin shall sign a full & final release . . . shall be executed

without delay. . . . " The agreement contemplated contemporaneous performance of the payment and the execution of the release. See CherCo Properties, Inc. v. Law, Snakard & Gambill, P.C., 985 S.W.2d 262, 266 (Tex. App. – Fort Worth 1999, no pet.). Furthermore, untimeliness in the performance of a condition does not excuse performance of a settlement agreement in which time is not made of the essence. Shaw v. Kennedy, Ltd., 879 S.W.2d 240, 246-47 (Tex. App. – Amarillo 1994, no writ). Presentment of the release for execution prior to the actual transfer of money to the Nazimuddins did not excuse their performance under the settlement agreement. We hold the settlement agreement is an enforceable contract.

The appellees argue that a check drawn on the account of an insurance company satisfies the settlement agreement provision for "cash consideration." The case upon which they rely, Pockrus v. Connelly, 521 S.W.2d 115, 117 (Tex. Civ. App. – Beaumont 1975, writ ref'd n.r.e.), construed a contractual provision for a "cash" payment to distinguish a down payment from credit payments. The case is correct, but it is not dispositive of the issues. A mediated written settlement agreement is enforceable in the same manner as any other written contract. TEX. CIV. PRAC. & REM. CODE ANN. § 154.071 (Vernon 1997). " **'Where the payment or offer of money is made a condition of an obligor's duty, payment or offer of payment in any manner current in the ordinary course of business satisfies the requirement unless the obligee demands payment in legal tender and gives any extension of time reasonably necessary to procure it.' "** TBS Exco, Inc. v. E.N. Smith, III Energy Corp., 818 S.W.2d 417, 420 (Tex. App. – Texarkana 1991, no writ) (quoting

RESTATEMENT (SECOND) OF CONTRACTS § 249 (1981). "When a tender is refused for reasons other than the medium tendered, one may not later . . . complain of the medium of tender." Penny v. Kelley, 528 S.W.2d 330, 332 (Tex. Civ. App. – Beaumont 1975, no writ).

In April 1999, counsel for the appellees notified the Nazimuddins that he had the settlement check in his possession and would release it when he received the executed release. The Nazimuddins' reply communicated their refusal to execute the release but did not explicitly demand payment in money. At the May 2000 hearing, Khevaja Nazimuddin admitted he and his wife did not specifically say "cash" when they first communicated their refusal to sign the release. By the time the Nazimuddins communicated their demand regarding the medium of payment, the Nazimuddins had already communicated their refusal to perform. Having refused to perform for reasons other than the medium of payment, the Nazimuddins could not avoid the contract because Woodlane tendered a check rather than currency in April 1999.

In the December 1999 hearing, Nazimuddin clearly communicated his desire to be paid in currency rather than by check. The trial judge noted during the hearing that payment of a settlement with a check is ordinary practice. The person being paid may nevertheless require payment be made in money, provided the payee allows an extension of time to procure legal tender. The appellees tendered a check, not money, but Nazimuddin did not provide an opportunity for Woodlane to produce currency instead of a check. Before he raised the issue of the medium of payment, Nazimuddin stated, "I

refused to comply simply because they did not do the settlement, and the law – once I accept their repudiation the law gives me certain elects. One, to fall back to my original suit or to seek enforcement. I made my election." Issues four through six are overruled.

Issue seven asks, "Whether the trial court denied the appellants 'due process rights under Law'?" The appellants' brief complains the trial court refused to consider their motion for summary judgment. The motion for summary judgment is not included in the record, nor can we discern whether the Nazimuddins requested a hearing on the motion, or whether they served a copy of the motion on the non-movant within the time required by the Rules of Civil Procedure. See TEX. R. CIV. P. 166a(c) (motion must be served 21 days before the time specified for the hearing); TEX. R. CIV. P. 4 (three days must be added to any time period when service is made by mail).

The Nazimuddins also claim that the trial court refused to consider their exhibits. The trial court heard arguments and evidence from both parties, asked if the parties had anything further to present to the court, and ruled that the appellees did not repudiate the settlement agreement. Then Khevaja asked if the court had ruled on his motion for summary judgment. The judge stated that the motion had not been considered because it had not been timely filed. Khevaja asked, "So I don't get to put into evidence the exhibits I had, the correspondence from him, et cetera, so it would be part of the file?" The trial court said no, because he had not offered them earlier.

The trial court conducted a trial on the merits of the parties' dispute regarding the settlement agreement, and provided an opportunity to present evidence. We find no due process violation. Issue seven is overruled.

Issue eight inquires, "Whether the trial court asked for and accepted incompetent evidence?" When the appellees' counsel asked to "enter into evidence as an exhibit the memorandum of agreement," the court asked if there was an objection and Khevaja replied, "Oh, you can enter it into evidence and after you enter it, I would like to make a comment." The comment was an objection that a line was cut off of one of the pages of the copy. The line apparently listed the released parties by name. The appellants complain on appeal that the exhibit was not properly authenticated. The appellants did not present that objection to the trial court. See TEX. R. EVID. 103(a)(1); TEX. R. APP. P. 33.1(a). Issue eight is overruled.

Issue nine asks, "Whether the judgment lacks legal and factual sufficiency?" The appellants argue that no evidence was taken at the hearing. As we noted in our review of issue one, the appellees' counsel and Khevaja Nazimuddin were sworn in as witnesses before they addressed the court regarding issues of fact. Issue nine is overruled.

Issue ten asks, "Whether the Judgment is supported by appellee's pleading?" The appellants essentially restate the argument raised in issue two. The appellees' pleadings adequately state their desire to enforce the settlement agreement. Issue ten is overruled.

Issue eleven asks, "Whether the judgment is inconsistent with the prayer?" The answer filed in the assessment

suit apparently asked for relief "at low or in equity." Defects of pleading are waived unless pointed out by special exception and brought to the attention of the trial court. TEX. R. CIV. P. 90. Issue eleven is overruled.

Issue twelve inquires, "Whether the trial has basis to award legal fees to appellees?" The Nazimuddins contend that there was no contract to breach because Woodlane repudiated the contract, did not make proper presentment, failed to tender cash, failed to present evidence that the Nazimuddins breached the agreement, and because the trial court breached the Nazimuddins' due process rights. Each of these arguments has been rejected elsewhere in this opinion. The Nazimuddins argue that the appellees' counsel failed to segregate the attorneys' fees incurred in prosecuting the deed restriction suit and in defending the assessment and association suits, from the attorneys' fees incurred in enforcing the settlement agreement. Clayton Hearn testified that his firm's actions undertaken to try to get Nazimuddin to comply with the settlement agreement cost $9,000. William Gammon testified by deposition that his **client incurred $4,106.75 in attorney fees since the settlement agreement. Issue twelve is overruled. The judgment is affirmed.**

AFFIRMED.

PER CURIAM

Submitted on January 23, 2001

Opinion Delivered January 25, 2001

Before Walker, C.J., Burgess and Gaultney, JJ.

APPENDIX B

CAUSE NO. 98-08-02973-CV

WOODLANE FOREST CIVIC ASSOCIATION	§	IN THE DISTRICT COURT OF
VS.	§	MONTGOMERY COUNTY, TEXAS
KHEVAJA NAZIMUDDIN AND LINDA NAZIMUDDIN	§	221ST JUDICIAL DISTRICT

CAUSE NO. 98-11-03937-CV

KHEVAJA NAZIMUDDIN	§	IN THE DISTRICT COURT OF
VS.	§	MONTGOMERY COUNTY, TEXAS
WOODLANE FOREST CIVIC ASSOCIATION, INC.	§	221ST JUDICIAL DISTRICT

CAUSE NO. 98-08-02762-CV

KHEVAJA NAZIMUDDIN	§	IN THE DISTRICT COURT OF
VS.	§	MONTGOMERY COUNTY, TEXAS
WOODLANE FOREST CIVIC ASSOCIATION, INC., CHARLES FUGEE, HOLLY WILENT, LINDA CARPENTER, CRISTINA NEMCHAK, LINDA BUSCHARDT	§	221ST JUDICIAL DISTRICT

JUDGMENT

(Filed May 4, 2001)

On May 2, 2000, the Claims and Counterclaims of Woodlane Forest Civic Association, Inc., Charles Fugee,

Holly Wilent, Linda Carpenter, Cristina Nemchak and Linda Buschardt ("Woodlane, et al.") against Linda and Khevaja Nazimuddin relating to the alleged breach of a settlement agreement in the above-captioned causes came on to be heard by trial to the bench. The Court having heard the arguments and evidence presented by the parties and the stipulated facts, finds in favor of Woodlane et al. as follows:

1. The parties stipulated that the only issues before the Court with regard to the Settlement Agreement made the basis of this action were (1) whether settlement funds were rendered by Woodlane, et al. and (II) whether tendering a check to the Nazimuddins was consistent with the terms of the Settlement Agreement.

2. The Court finds that the settlement funds were tendered and that the tender of a check was not a breach or repudiation of the agreement by Woodlane et al.

3. The Court finds that the Nazimuddins breached the settlement agreement entered into on February 3, 1999.

4. The Court finds that Woodlane et al. are entitled to specific performance of the settlement agreement.

5. The Court finds that Woodlane et al. incurred reasonable and necessary attorneys' fees as a result of the Nazimuddins' breach in the amount of $13,000.00

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Woodlane Forest Civic Association, Inc., Charles Fugee, Holly Wilent, Linda Carpenter, Cristina

Nemchak and Linda Buschardt shall recover their reasonable and necessary attorneys' fees in the amount of $13,000 ($9,000.00 from Roberts, Markel & Folger, L.L.P. and $4,000.00 from William G. Gammon & Associates). In the event that the Nazimuddins appeal this Judgment to the Court of Appeals, an additional $5,000.00 shall be awarded to Woodlane et al. In the event the Nazimuddins file a Writ of Error to the Texas Supreme Court, an additional $2,500.00 shall be awarded and an additional $2,500.00 if the Writ is granted.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Linda and Khevaja Nazimuddin shall have twenty (20) days from the date of this Judgment to remove their trailer, which is referenced in the Settlement Agreement and repair their fence, consistent with the terms of the Settlement Agreement.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the underlying claims in the above-referenced cause members are hereby dismissed with prejudice.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Woodlane et al. shall be entitled to post-judgment interest at the statutory rate from the date of this Judgment until paid in full.

The Court denies all relief not granted hereto.

May 4, 2000,

/s/ Suzanne Stoval
Presiding Judge

APPENDIX C

(SEAL) **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

June 07, 2001

Mr. Clayton Rowland Hearn
2500 City West Blvd., Suite 1350
Houston, TX 77042

RE: Case Number 01-0122
Court of Appeals Number: 09-00-00210-CV
Trial Court Number: 98-08-02762-CV

Style: KHEVAJA NAZIMUDDIN and
LINDA NAZIMUDDIN
v.
WOODLANE FOREST CIVIC ASSOCIATION,
CHARLES FUGEE, LINDA CARPENTER,
HOLLIE WILIENT, CHRISTINA NEMCHAK,
LINDA BUSCHARDT

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing, as amended and supplemented in the above styled petition for review. Motion to supplement granted.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca E. Morin
Blanca E. Morin, Deputy

cc: Ms. Carol Anne Flores, Clerk
Ms. Barbara Gladden-Adamick
Khevaja Nazimuddin
Linda Nazimuddin

APPENDIX D

District Court of Montgomery County, Texas

221st Judicial District

WOODLANE FOREST CIVIC ASSOCIATION,

vs.

KHEVAJA NAZIMUDDIN and LINDA NAZIMUDDIN

* * *

[5] MR. NAZIMMUDIN: Because they refused to honor the parts of the settlement agreement. And when they refused to do that –

THE COURT: What is this they didn't do?

MR. NAZIMMUDIN: They refused to give me the money that they wre supposed to give me.

THE COURT: Were you supposed to give him money?

MR. HEARN: Upon signing of the release.

THE COURT: You have to sign the release. Give me the check.

MR. HEARN: I don't have it today.

MR. NAZIMMUDIN: Ma'am, it says they give it to me, first.

THE COURT: Okay. This is ridiculous. This is absolutely ridiculous. You sign the release and he hands you the check. He is a lawyer. He loses – he loses his license if he doesn't hand it to you.

MR. NAZIMMUDIN: I don't know – these people have lied to me and –

THE COURT: I am just telling you, you bring it to –

MR. HEARN: You can come back in here and tell her if I don't give it to you.

* * *

[13] MR. NAZIMUDDIN: What we agreed on into that room there that we mediated –

THE COURT: What bank is that drawn on?

MR. HEARN: Federal Insurance Company. It's – I'm not quite sure if that's the bank or what. I'm sorry, Melon Bank.

THE COURT: Okay. Okay. So I ordered you to accept this check and to sign the release.

MR. NAZIMMUDIN: Correct.

THE COURT: Okay. And you are wanting me to not order you to sign the check because – I mean not – you want me to withdraw my order to sign the release in exchange for the check because it was not cash, it was a check.

MR. NAZIMMUDIN: Correct. That's what we agreed on. We meet face-to-face. We had an agreement. They could have come up with something else in that room when we met.

THE COURT: Okay. So that's the only – from what I can hear is the only issue.

MR. NAZIMMUDIN: Correct.

THE COURT: Okay. So you want me to not – to rescind my – or vacate my order ordering to you to do that?

MR. NAZIMMUDIN: Correct.

* * *

May 2, 20000 Trial

[15] about a check – an individual has control of their money when a check is given.

THE COURT: Uh-huh.

MR. NAZIMMUDIN: And it says no. No control is given, no.

THE COURT: Okay. Anything else?

MR. NAZIMMUDIN: No, ma'am. And then I asked the Court to the judicial notice of the cases that I have cited in the two –

THE COURT: I think that this – as I understand it, the facts are not in dispute. The facts are that an agreement was made and that part of the agreement was that payment was to be made in cash by the homeowners association to Mr. Nazimuddin and his wife in exchange for them to do something. And the only issue I have to decide at this instant is whether or not – and everybody agrees that a check was tendered to Mr. Nazimuddin which he refused because it was not paper or coin.

MR. NAZIMMUDIN: No, ma'am. Let me correct you. No, a check – a check was not tendered, ma'am. They wanted me to sign a release of liability before they

tendered the check. And I said, no, no, that's not what the agreement calls for.

THE COURT: Okay. So the fact that they [16] gave you – So, you think that they breached the agreement because they – well, you tell me.

MR. NAZIMMUDIN: There is a – there is a condition precedent for me to sign the release of liability and the agreement. The condition precedent was that I was to receive cash. They wanted me to sign the release of liability, send it back to them. They would send me a check and then I could go to the bank and so forth. That's not the fulfillment of the condition precedent in the agreement.

THE COURT: Okay.

MR. NAZIMMUDIN: The condition precedent is that I receive cash. On the receipt of cash that fit the condition precedent, then I sign the release of liability.

THE COURT: Is that what you understand the facts to be?

MR. HEARN: Your Honor, I believe we've gone through this in several hearings in this Court. We offered the check to Mr. Nazimuddin in open court and the release was in front of him and he refused to sign it based on the fact that it was a check rather than cash. If he had raised this objection in the beginning, we would have gone and cashed the check and brought him cash. This was never brought to our [17] attention.

MR. NAZIMMUDIN: That's not correct, ma'am. I produced my wife as a witness that it was brought to their attention. Some of the correspondence to them, that

I wrote to them brought this up. They knew way back in February. They knew in April the check was not an acceptable –

THE COURT: The issue really is, is they offered you in several instances a check but you wanted paper or coin?

MR. NAZIMMUDIN: Correct.

THE COURT: That is what this is about?

MR. NAZIMMUDIN: Before I signed the release of liability.

THE COURT: You wanted paper or coin before you would sign it?

MR. NAZIMMUDIN: Or a cash equivalent, like a cashier's check or postal order, which I think most business accepts as bona fide.

THE COURT: Okay.

MR. NAZIMMUDIN: But they knew before.

THE COURT: Mr. Hearn, was the homeowners association apprised of the fact that he would accept a cashier's check or money order?

MR. HEARN: Never. This issue could have

* * *

[19] cash or anything like that. There was also a document for nonsuit, which I – that's the only document we signed and sent them back, but not the release of liability. After we send back that document, my wife got a phone call from Dr. Hearn's office asking why we did not sign

the release of liability. And when he originally called, it was – it was explained to her what the settlement agreement says, that we were supposed to have cash first. They didn't produce cash until then. They did not come back with an offer and we would not sign the release of liability unless the agreement is followed. They told us that they would never agree to that. They would never pay us in cash. And, therefore, we told them that we considered that a breach of the agreement. My wife did. And that as far as we're concerned, we accept your breach and we will go no further.

Subsequent to that, they got correspondence from Dr. Markel which he cited parts of the settlement agreement stating it's – really stating that we have to sign the release of liability first before we get – I think they used the words funds. I wrote him back and I says, the first – the condition precedent which started this was discussed with an individual from his office and we wouldn't sign the [20] release of liability. He sent me a lot of correspondence stating he has a check waiting in his office and when we signed the release of liability, he will release the funds. I wrote him again that that's not according to the agreement. It is not acceptable to us and we considered the agreement to be breached.

Shortly then – thereafter then we received other correspondence to go back to the mediation and I told them there is – there is nothing in the agreement that says when it's repudiated, we go back to mediation. And then sanctions and several other court things were heard after that.

We steadfastly from the very beginning hold that the medium of payment was cash. I agree with that. We did not say any cash equivalent, but they didn't come back to us and says would you accept that, cash equivalent.

THE COURT: Okay. Do you have any questions of Mr. Nazimuddin?

MR. HEARN: Mr. Nazimuddin, do you have any correspondence from yourself or from your wife to my firm explaining that you felt that the payment should be made in cash rather than check?

MR. NAZIMMUDIN: We – specifically stated cash? We specifically – I didn't say cash. We [21] specifically point out applicable parts of the –

MR. HEARN: Objection. Nonresponsive.

THE COURT: The question was: Do you have anything in writing where you made that claim?

MR. NAZIMMUDIN: No. But we specifically point out –

THE COURT: That was just the question. Do you have anything in writing and the answer is no.

MR. NAZIMMUDIN: Correct.

MR. HEARN: And isn't it true, Mr. Nazimuddin, that you would not have accepted a check from my firm?

MR. NAZIMMUDIN: A personal corporate check?

MR. HEARN: A corporate check –

MR. NAZIMMUDIN: Absolutely.

MR. HEARN: – from my firm or from Chubb Insurance?

MR. NAZIMMUDIN: Absolutely I would not accept it.

MR. HEARN: Your Honor, whether a check was tendered to him or not, he's already stated that he absolutely would not accept it. So we're still hung up on the question of whether a check is the same as cash for purposes of this written agreement and I think

* * *

[23] MR. NAZIMUDDIN: I've seen it, Your Honor.

THE COURT: In your cases, it's possible; however, I have never seen it happen. I think you are being frivolous and I think you are being ridiculous and you have caused an enormous amount of expense to the homeowners association and I am going to grant sanctions in the amount of $1,000; and this is such a simple case and you have all – you have the ability to get this over with and you're refusing to do it and what I'm seeing is that you are enjoying this fight. The basis of the case has long since been forgotten. You simply enjoy filing these motions and so forth, for whatever reason I can't quite figure out. But, in any event, I am going to grant your sanctions for $1,000 and I am going to suggest that you sign that release, get your wife to sign the release, and I will hand you the check.

MR. HEARN: Your Honor, I have one more point to make. In my motion for sanctions I asked that the

Court strike his pleadings. I realize that is a very extreme measure. I don't come into courts often asking for death penalty sanctions, and I am not going to be asking that that be granted today. What I would ask that if Mr. Nazimuddin does not comply with the

* * *

[27] doesn't have to respond until May the 11th. It is today, May the 2nd. We are having the final hearing in the case. So, I'm not going to consider the summary judgment because we are – because we are deciding the case in chief right now today.

MR. NAZIMMUDIN: Okay. Okay. I understand. I am just trying to get clarification. I am not disagreeing with you.

THE COURT: I know. I didn't think you were.

MR. NAZIMMUDIN: Yeah. Yeah. So what we just had here was the trial of the breach of contract?

THE COURT: Correct.

MR. NAZIMMUDIN: Correct. So I don't get to put into evidence the exhibits I had, the correspondence from him, et cetera, so it would be part of the file?

THE COURT: No. I mean – you didn't offer them on the – the only issue we had was whether or not money had been offered and refused. That was the whole issue. Everybody agreed to that. So, I found that they did and the whole thing is – you know, I can't help but think that we are – I'm not exactly sure why we're even doing this. I'm getting to think you like the process. If you want the money and they [28] want the – you know, if this

were really about the controversy, it would have been over a long time ago. It's about something else and I'm not sure what, but we can't use the courts for people to play intellectual games. The courts are for disputes.

MR. NAZIMMUDIN: I know. I'm not –

THE COURT: So I have found that this is an absolute tempest in a teapot. They offered you the money. You refused to take it. You have breached the agreement. You need to follow the agreement. You need to paint the fence. You need to move the tractor (sic). You need to sign the release and I'm going to dismiss this from my docket.

Now, they want attorney's fees for having to come up here on this silliness, so we are going to hear about that.

MR. NAZIMMUDIN: Okay.

MR. HEARN: Your Honor, we have two firms involved actually. My firm represents Woodlane in its defense capacity and I will testify to that.

THE COURT: You can testify from there.

CLAYTON HEARN,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

MR. HEARN: Okay. Your Honor, I have

* * *

APPENDIX E

Court of Appeals of Texas
Ninth District, Beaumont

BRIEF OF APPELLANT

* * *

XX.

Issue No. 7 – DENIAL OF NAZIMUDDINS DUE PROCESS RIGHTS

The trial court abused its discretion by denying the Nazimuddins their due process rights at law under the Texas and Federal constitutions (U.S. CONST. amend. XIV, @ 1; TEX. CONST. art. I, @ 19.).

Around February 28, 2000, Woodlane filed two documents titled "Defendant's First Amended Answer and Counterclaim" for Cause No. 98-11-03937-CV and Cause No. 98-08-02762-CV. The language of both of these documents are similar. On March 8, 2000, Nazimuddin filed his response to the two "Defendant's First Amended Answer and Counterclaim". Around March 9, Woodlane filed, with the District Clerk, a document titled "PLAINTIFF'S AMENDED PETITION AND APPLICATION FOR INJUNCTION". On March 31, 2000, the Nazimuddins filed their response to Woodlane's "AMENDED PETITION AND APPLICATION FOR INJUNCTION". On April 11, 2000, Nazimuddins filed a motion for summary judgment in response to Woodlane's breach of contract allegation.

Rule 45, T.R.C.P. provides:

> Pleadings in the district and county courts shall
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> (a) be by petition and answer.
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> (b) consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be ground for objection when fair notice to the opponent is given by the allegations as a whole.

The Trial Court was aware of the above pleadings filed by the Nazimuddins with the Court on March 8, March 31 and April 11, 2000. A document is "filed" when it is tendered to the clerk. See Arndt v. Arndt, 709 S.W.2d 281, 282. The legal effect of filing a document remains the same whether the judge presiding over the litigation is aware of its filing or not. Cf. Davis v. Jefferies, 764 S.W.2d 559, 560 (it is error for a trial court to grant a default judgment after an answer has been filed, even if the trial court is unaware that it has been filed). In Curtis v. State, 762 S.W.2d 958, 959, a defendant filed an objection to an assigned judge on the morning of the day on which the case was to be tried. In Curtis, the Court concluded that the objection was filed "before the judge called the case for hearing" and that it was therefore timely. See Curtis, 762 S.W.2d at 959. These pleadings outline that the Nazimuddins have more than one breach of contract defenses. The Trial Court was aware of the Nazimuddins' defenses before May 2, 2000, the breach of settlement contract trial date.

The trial court, at the on-set of the hearing, stated that it is limiting the hearing as to "whether "check" is the same as "cash"? The trial court asked the Nazimuddins to orally explain their position. The Nazimuddins told the Court that they have exhibits and a witness to present to the Court to support their position. The Court told the Nazimuddins that it is not interested in any of their evidence. It only wants oral explanation. The Court asked for and accepted an exhibit from Woodlane and heard testimonies from Woodlane's witnesses.

The refusal of the Court to allow the Nazimuddins to present their evidence and allow their witness to be heard denied them their due process of law rights. In Turcotte v. Trevino, 499 S.W. 2d 705, the court entered an order of dismissal on pleadings. That court stated as follows: "It is fundamental that the due process clause in the Federal Constitution assures a full hearing before the court, commission or other tribunal, empowered to perform the judicial function invoked. That includes the right to introduce evidence at a meaningful time and in a meaningful manner and have judicial findings based upon it. United States Constitution, 14th Amendment, @ 1;. . . . That rule applies to all trials and all judicial hearings of every kind and nature. The right of a litigant to present evidence in support of his case is not left to the discretion of the trial court. That right is unqualified and absolute. Texas Constitution, Article 1, @ 19, Vernon's Ann. St." See also, Fuentes v. Shevin, 92 S.Ct. 1983; Jordan v. Jordan, 653 S.W.2d at 358. The trial court deprived the Nazimuddins of their due process at law right.

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